UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

DEMOCRATIC PARTY WASHINGTON STATE, *et al.*,

Plaintiffs,

v.

SAM REED, as Secretary of State of the State of Washington *et al.*,

Defendants.

REPUBLICAN STATE COMMITTEE OF WASHINGTON, *et al.*

Intervenors,

LIBERTARIAN PARTY OF WASHINGTON STATE, *et al.*,

Intervenors,

WASHINGTON STATE GRANGE, *et al.*,

Intervenors.

Case No. C00-5419FDB

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT and DENYING PLAINTIFFS DEMOCRATS' and INTERVENORS REPUBLICANS' MOTIONS FOR SUMMARY JUDGMENT

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WASHINGTON STATE DEMOCRATIC PARTY V. REED, et al. No. C00-5419FDB

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I. INTRODUCTION

This matter is before the Court on cross-motions for summary judgment filed by Plaintiffs, Washington State Democratic Party, *et al.* (hereafter Democratic Party); Defendants Sam S. Reed, as Secretary of State, *et al.* (hereafter Reed, Secretary of State, State, or Defendants); and Intervenors Republican Party of The State of Washington, *et al.* (hereafter Republican Party).

Intervenors Libertarian Party of Washington State, *et al.* (hereafter Libertarian Party) and Intervenors Washington State Grange, *et al.* (hereafter The Grange) have filed responsive memoranda, as have the other parties to each of the summary judgment motions. The motions are ready for the Court's consideration.

Defendant Reed has filed three motions to strike certain declarations submitted by the Democratic and Republican parties, and these, too, are at issue and ready for the Court's consideration.

On March 8, 2002, the Court held oral argument on the summary judgment motions. The Plaintiffs, Defendants, and Intervenors participated in oral argument, and they presented their views and responded to questions from the Bench. The Grange submitted a document, marked in evidence, that further supported its case. While the Grange said that it could submit further evidence should the Court hold a full trial, it admitted that such evidence would merely reinforce what it has already presented. The other parties were in agreement that this matter is ready for the Court's decision on the cross motions for summary judgment.

The Democratic Party seeks a declaratory judgment that Washington State's blanket primary election system is unconstitutional because it imposes a severe burden on the First Amendment rights of the Party and its members and because the primary system either does not advance a compelling state interest or, to the extent that it does, there are other, less burdensome alternatives to advance those interests. The Democratic Party contends that the votes of those affiliated with the Party are substantially diluted by the votes of those who refuse to affiliate with

the Party, or who are openly affiliated with the Republican party. As a result, contends the Democratic Party, election outcomes are altered, and the Democratic candidates who survive the blanket primary do not address Democratic issues in government to the extent that they would if they had to achieve re-nomination in a process in which Democratic votes were not diluted by the votes of non-Democrats.

The Republican Party argues that this case presents a straightforward issue of the application of clear U. S. Supreme Court precedent to uncontested material facts. The Republican Party states that the essential, uncontested facts are that Washington's blanket primary forces the Republican Party to have its standard-bearers in the general election chosen not only by Republicans, but also by Democrats, independent voters, and third party voters, thus altering the message of Republican candidates. The Republican Party argues that this adulteration of the Republican Party's message and candidate selection process, alone, is sufficient for the blanket primary to be an unconstitutional invasion of First Amendment rights.

Defendant Secretary of State Reed argues that the Constitution does not vest political parties with thc right to dictate the manner in which the voters select candidates for public office, and that voters in Washington do not participate in the primary as party members or affiliates, but as the general electorate winnowing the field and choosing nominees to qualify for the general election ballot. Furthermore, Secretary of State Reed argues that the evidence submitted by the political parties is insufficient to satisfy their burden of showing that Washington's election system is unconstitutional.

The Grange Intervenors oppose the summary judgmcnt motions of the political parties arguing that the political parties have failed in their proof and that they likewise lose a test balancing the arguable impacts on the political parties' associational right with the legitimate, compelling interests protected and advanced by Washington's unique election system. The Grange

argues that their First Amendment rights as a non-partisan association advance their political interests best in this system allowing them to vote for candidates from either party.

The Libertarian Party opposes Defendant Secretary of State Reed's motion for summary judgment arguing that because it is smaller than the two major parties, its ability to preserve its core political values and advance its political message is at greater risk. The Libertarian Party had a right to nominate its own candidates until the 2000 election, but now as a fledgling major party, it has not been shown that it has the ballot strength to preserve the integrity of its message or to withstand the dilution of its ballot strength by multiple persons filing as Libertarian candidates who may not be affiliated with or sympathetic to the goals and messages of the party. Furthermore, the Libertarian Party argues that it does not need opinion testimony to demonstrate harm, that the harm, or risk of harm is obvious.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is proper if the moving party establishes that there are no genuine issues of material fact and it is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). If the moving party shows that there are no genuine issues of material fact, the non-moving party must go beyond the pleadings and designate facts showing an issue for trial. *Celotex Corp. v. Catrett*, 477 *U.S. 317, 322-323 (1986). Summary judgment is proper if a defendant shows that there is no* evidence supporting an element essential to a plaintiff's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). Failure of proof as to any essential element of plaintiff's claims means that no genuine issue of material fact can exist and summary judgment is mandated. *Celotex*, 477 U.S. 317, 322-23 (1986). The nonmoving party "must do more than show there is some metaphysical doubt as to the material facts." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

The substantive law governs whether or not a fact is material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Inferences drawn from the facts are viewed in favor of the non-moving party. *T.W. Elec. Service v. Pacific Elec. Contractors, 809 F.2d 626, 630-31 (9th Cir.*

1987). All reasonable doubts as to the existence of a material fact are resolved against the moving party. *Id.* at 631. Summary judgment is not appropriate if the credibility of witnesses is at issue. *Securities and Exchange Comm. V. Koracorp Industries, Inc.*, 575 F.2d 692, 699 (9th Cir.), *cert. denied*, 512 U.S. 1236 (1994).

The party alleging the unconstitutionality of a statute has the burden of proof. A statute is presumed constitutional, and "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Heller v. Doe*, 509, U.S. 312, 320 (1993), citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973).

III. DISCUSSION

A. LEGAL BACKGROUND

The issue before the Court is whether Washington's blanket primary is unconstitutional in view of the Supreme Court's decision in *California Democratic Party v. Jones*, 530 U.S. 567 (2000). That case addressed the issue of whether California's primary system unconstitutionally burdened the political parties' First Amendment right of association. This right of association, derived from freedom of speech and assembly, was clearly announced in *NAACP v. Alabama*, 357 U.S. 449, 460-61 (1958): "[F]reedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.." The Supreme Court held in *California Democratic Party*:

> In sum, Proposition 198 forces petitioners to adulterate their candidate-selection process – the "basic function of a political party," *ibid.* – by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome – indeed, in this case the *intended* outcome – of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

530 U.S. at 581-82. The Supreme Court then turned to the seven state interests claimed to be compelling.

The Supreme Court found two of the asserted interests – producing elected officials who better represent the electorate and expanding candidate debate beyond the scope of partisan concerns – to be no more than circumlocutions for producing nominees and nominee positions other than those the parties would choose. The third interest – ensuring that disenfranchised persons enjoy the right to an effective vote – was seen as being merely a recharacterization of the nonparty members' keen desire to participate in selection of the party's nominee as "disenfranchisement" if that desire is not fulfilled. The Court said that the "disenfranchised" voter was actually a voter who was not a member of the majority party in a "safe" district. The four remaining interests – promoting fairness, affording voters greater choice, increasing voter participation, and protecting privacy – "are not, like the others, automatically out of the running; but neither are they *in the circumstances of this case*, compelling." 530 U.S. at 584 (emphasis in the original). The Court said that the determination of whether these asserted state interests are compelling

> ... is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant.

530 U.S. at 584 (emphasis in original).

The Court then found all four of the asserted state interests not to be compelling. The Court saw the fairness issue as relating to the perceived inequity of nonparty members in "safe" districts not being allowed to determine the party nominee; the Court saw that "inequity" as less unfair, if it was unfair at all, than "permitting nonparty members to hijack the party." *Id.* The matter of affording voters greater choice failed because "it is obvious that the net effect of this scheme – indeed, its avowed purpose - is to *reduce* the scope of choice, by assuring a range of candidates who are all more "centrist." *Id.* (emphasis in original). This resulted in the range of choices favored by the majority of voters being increased. The interest of increasing voter participation was a variation on the greater choice theme and suffered from the same defect, in the Court's view. Finally, the Supreme Court did not think that the privacy interest, the confidentiality of one's party affiliation,

could be considered in all cases to be a "compelling" one, reasoning that "[I]f such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices." *Id.* at 585. In conclusion, the Supreme Court said that even if all four interests were compelling, Proposition 198 was not a narrowly tailored means of furthering them.

The Court then went into a description of a type of primary that would protect these interests, a *nonpartisan* blanket primary. Under such a primary, the state determines the qualifications required for a candidate to have a place on the primary ballot – nomination by established parties, voter-petition requirements for independent parties – then each voter, regardless of party affiliation, may vote for either candidate, and the top two vote getters (or however many the State prescribes) then move on to the general election. In the Court's view, this system

> "has all the characteristics of the partisan blanket primary, save the constitutionally crucial one: Primary voters are not choosing a party's nominee. Under a nonpartisan blanket primary, a State may ensure more choice, greater participation, increased "privacy," and a sense of "fairness" – all without severely burdening a political party's First Amendment right of association."

Id. at 585-86.

B. WASHINGTON'S PRIMARY

In analyzing whether Washington's primary election system impermissibly burdens political parties' associational rights, it is important to understand Washington's primary system as compared with that of California against the background of the Supreme Court's reasoning. Washington's historical perspective is relevant as well when analyzing Washington's primary, because the State's interests in this blanket primary are animated by the electorate's evident desires over a long period of time.

The United States Constitution leaves it to the states to regulate elections. The Elections Clause of the United States Constitution, Art. I, § 4, cl. 1, provides: "The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the

Legislature thereof." The states also have broad control over the election process for state offices. *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 , 217 (1986). Nevertheless, this "state action" in regulating elections must be informed by other Constitutional provisions such as those contained in the First and Fourteenth Amendments.

California Democratic Party described the California system. In California, a candidate for public office gains access to the general election ballot by winning a political party's primary or by filing as an independent and receiving a certain percentage of votes. Party membership is defined through public registration. Until 1996, California held "closed" partisan primaries, in which only persons who were members of the political party – those who declared their affiliation when they registered to vote – could vote on the party's nominee. In 1996, via Proposition 198, California changed its closed primary to a blanket primary. After 1996's Proposition 198, each voter, rather than receiving a ballot with candidates of his own declared party, received a ballot that listed every candidate regardless of party affiliation and allowed the voter to choose freely among them. It remained the case that the partisan candidate receiving the greatest number of votes is the nominee of that party at the ensuing general election.

In Washington, there is no provision for registering voters by party affiliation. (*RCW 29.07.070 Voter qualification information – Verification notice*) A candidate who desires to have his or her name printed on the ballot for election to office other than president or vice president of the United States must file a declaration and affidavit of candidacy, and among other things, shall indicate a party designation, if applicable. (*RCW 29.15.010 Declaration and affidavit of candidacy*) A candidate for a partisan office qualifies for having his name on the general election ballot if that candidate receives at the primary election at least one percent of the total number of votes cast for all candidates for that position and a plurality of the votes cast for the candidates of his or her party for that office. (*RCW 29.30.095, Partisan candidates qualified for general election*)

Political parties are much more in the forefront under California's election law. For example, in Washington, while a candidate for office indicates, if applicable, a party designation, in California, a candidate must present a declaration of candidacy, which will not be filed unless the candidate shows in his affidavit of registration that he has been continuously registered as being affiliated with the political party the nomination of which he seeks for at least three months immediately prior. *(Cal. Elect. Code § 8001) An elections official attaches a certificate to the* candidate's declaration showing the date on which the candidate registered his or her affiliation with the political party the nomination of which is sought, and indicating, furthermore, that the candidate has not been affiliated with any other qualified political party for the three-month period specified. *Id.* Thus, California election law provided that at the primary, a candidate had to pass some muster in demonstrating that he or she was among the party faithful. Then, until 1996, the voters who had declared in their registration forms that they were affiliated with a particular political party (Cal. Elect. Code § 2150) would receive a ballot consisting only of candidates of that political party, and they would then vote for their choice. The candidate who received the highest number of votes for each office would become the nominee of that party in the ensuing general election. Thus, for the ensuing general election, Democrats chose their standard bearers for each office and Republicans chose their standard bearers.

Then an initiative statute was adopted following the voters' March 1996 adoption of Proposition 198. The initiative backers promoted the blanket primary largely as a measure that would "weaken" party "hard-liners" and ease the way for "moderate problem-solvers." *See California Democratic Party*, 530 U.S. at 570. Thereafter, all persons entitled to vote, including those not affiliated with any political party, were allowed to vote for any candidate regardless of the candidate's political affiliation. The result was that known, registered Democrats and known, registered Republicans were allowed to vote for any Republican or Democrat or other candidate. The partisan candidate receiving the most votes at the primary became the nominee of that political